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No. 03-1391

IN THE

Supreme Court of the United States

EDDIE JACKSON, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

APPELLANTS' REPLY BRIEF

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Although Appellees Perry *et al.* ("the State") begin their Motion to Affirm by claiming that Appellants Jackson *et al.* have ignored the District Court's findings, the reality is just the opposite. Appellants have properly accepted the *facts* found below, while disputing some of the conclusions the court drew from those facts. It is Appellees who repeatedly recast the facts and the reasoning of the District Court in an effort to avoid review of a decision that raises a host of important legal questions. They then invite this Court to issue a summary affirmance that would be understood as authorizing the single-minded pursuit of maximum partisan gain in redistricting – even in mid-decade with a lawful map already in place, and even where achievement of that political goal requires (1) abandonment of any effort to maintain racial fairness (as occurred here with African-Americans) and (2) racial gerrymandering in order to maintain the appearance of fairness (as occurred here with Latinos). The Court should decline that invitation and note possible jurisdiction.

I. The Constitution Bars Replacement of a Fair and Legal Districting Plan Solely to Maximize Partisan Advantage.

Despite Appellees' efforts to muddy the waters, the basic facts remain undeniable. As the District Court repeatedly found based in part on Appellees' own admissions, the Legislature's *single-minded* intent in designing the 2003 congressional map was to maximize partisan gain. J.S. App. 29a ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."); *id.* at 32a-33a (Republicans "'decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents.'") (citation omitted). We are thus dealing with

a congressional districting plan motivated *entirely* by a legislative goal that all nine Justices agreed was constitutionally illegitimate in *Vieth v. Jubelirer*. *See* 124 S. Ct. 1769, 1785 (2004) (plurality opinion); *id.* at 1798 (Kennedy, J., concurring in the judgment); *id.* at 1803 (Stevens, J., dissenting); *id.* at 1815 (Souter, J., dissenting); *id.* at 1822 (Breyer, J., dissenting).

The State now, of course, claims that "the Legislature had no singular desideratum." Mot. to Aff. at 4. It points, for example, to evidence that details of the borders of certain districts reflected particular legislators' agendas. *See id.* But the fact that the line-drawers were willing to accommodate individual preferences where doing so would not detract from their core partisan goals hardly undercuts the District Court's finding about their single-minded intent. Appellees also claim that they sought to eliminate a pro-Democratic bias in the court-drawn 2001 plan. But the court specifically found that the 2001 plan already "reflected the growing strength of the Republican Party in Texas, with 20 of the 32 seats offering a Republican advantage." J.S. App. 29a. And the State's own expert testified that the 2001 plan was somewhat biased to favor the *Republicans*. Ex. 141, at 21. Finally, the State argues that it was simply trying to replace a court-drawn plan with a legislatively enacted one. But the court-drawn plan existed only because legislators had refused to meet their constitutional obligation to redraw the map in 2001, a refusal that occurred because the political balance in the Legislature in 2001 meant that any map enacted then would had to have been fair to both Republicans and Democrats. Appellees can hardly be exonerated of single-minded partisanship because they chose to do nothing until the Legislature had come under the control of one party, two years after they had a constitutional duty to redraw the lines.

As a practical matter, such redistricting motivated solely by partisanship could only occur as here in mid-decade, when legislators choose to revamp an existing, fully lawful map. Right after the decennial census, congressional districts will always be malapportioned, and thus there is always a need to redraw them to comply with the Constitution's strict one-person, one-vote rule. So legislative motives will always be mixed. But a mid-decade revision not prompted by some finding of illegality can be presumed to be a purely partisan maneuver – especially when one political party has just gained unilateral control of the legislature and governorship. And here the evidence bore out such a presumption.[1]

Moreover, the 2003 map has all the hallmarks of an extreme partisan gerrymander. If one looks at the State overall, the map renders shifts in voting behavior largely irrelevant, locking in a 22-to-10 Republican advantage regardless of whether the Republicans lose their current majority status in the Texas electorate or increase their margin. Ex. 44, at 24-25; *see also* Ex. 141, at 24.[2] Looking specifically at the 17 districts where Appellants reside, there are numerous examples of bizarre shapes and disregard for communities of interest, directly tied to the partisan agenda.

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[1] In the court below, Appellants argued that an extreme partisan gerrymander violates the Constitution and that mid-decade redistricting violates the Constitution. The State's argument that Appellants waived their right to argue that a mid-decade extreme partisan gerrymander is unconstitutional, *see* Mot. to Aff. at 11-13, is just silly.

[2] In the words of the State's own expert, Dr. Ronald Keith Gaddie, Plan 1374C "was designed by the Republican state legislature to advantage Republicans in congressional elections in the state of Texas. The map creates ten Democratic districts and twenty-two Republican districts; disrupts numerous Democratic incumbents from their constituencies; and pairs many Democratic incumbents in Republican districts with Republican incumbents." Ex. 141, at 24.

Two such examples are Districts 26 and 25. The former district encircles the African-American community in southeast Fort Worth, links it via a stringy corridor with Anglo suburbanites in Denton County to the north, and then runs up to the Oklahoma border. The latter district, as noted *infra*, uses a chain of largely unpopulated counties to link up two concentrations of Latino population with little in common other than ethnicity. *See* J.S. App. 164a, 165a (color maps).

As the District Court itself suggested,[3] these glaring facts provide this Court with the opportunity to craft at least one constraint on partisan gerrymandering that avoids the concerns about judicial manageability that five Justices expressed in *Vieth*. The Court could craft a rule allowing legislative revisions of congressional lines only when no lawful plan already exists – *i.e.*, no more than once a decade in most instances.[4] Only a compelling explanation should overcome the heavy presumption that the legislature's reasons for replacing a lawful plan are purely partisan. As the court below noted, such a rule, while not a panacea, would have substantial practical value. J.S. App. 36a-37a. It would also be entirely manageable.

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[3] *See* J.S. App. 37a (preferring judicial limitations on partisan gerrymandering "that focus [more] upon the time and circumstances of partisan line-drawing, and less upon the 'some but not too much' genre of strictures").

[4] Tolerating redistricting only at the beginning of each decade "tak[es] agenda-setting power away from state political actors[,] . . . partially randomiz[es] control over the redistricting process, [and lessens] the likelihood that redistricting will occur under conditions favoring partisan gerrymandering." Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 776 (2004).

II. This Case Squarely Presents the Question Whether Section 2 of the Voting Rights Act Sometimes Requires Preservation of Districts Where a Protected Group Exercises Effective Control Even Though It Constitutes Less than Half of the Voters.

The State's discussion of the Voting Rights Act claim regarding former District 24 in Dallas-Fort Worth again mischaracterizes what the District Court actually said and did. The court's primary holding was that Appellants' challenge to the elimination of District 24 failed as a matter of law because Appellants could not draw an additional *majority*-black district. The court specifically rejected our argument that after *Georgia v. Ashcroft*, 539 U.S. 461 (2003), it no longer makes sense to consider only the majority-minority districts that could be drawn, while ignoring opportunities to create "coalitional" districts where minorities can elect their preferred candidates with the support of a reliable segment of non-minority "cross-over" voters. J.S. App. 43a-57a. In so doing, the court expressly invoked and followed the Fifth Circuit precedent establishing the "Fifty-Percent Rule" for claims under Section 2. *Id.* at 51a-52a & nn.111-12 (citing *Perez v. Pasadena Ind. Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999), and *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999)); *id.* at 53a (Plaintiffs "ask this court to do more than well-settled law will allow.").

But since that opinion came down, the split in the lower courts has only deepened, as the First Circuit has flatly held that it is error to reject Section 2 claims merely because plaintiffs cannot draw a majority-black or majority-Latino district. *Metts v. Murphy*, 363 F.3d 8, 10-12 (1st Cir. 2004) (en banc) (*per curiam*). In so doing, the court acknowledged the possibility that a successful claim could be brought where the plaintiff group "was a numerical minority but had

predictable cross-over support from other groups." *Id.* at 11; *see also McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853-54 (N.J. 2003), *cert. denied*, 124 S. Ct. 1068 (2004); *cf. Dillard v. Baldwin County Comm'rs*, No. 03-14668, __ F.3d __, 2004 WL 1558287, at *7 n.7 (11th Cir. July 13, 2004) (leaving the question open).[5]

A review of the actual undisputed facts in Texas shows why the Fifth Circuit and the court below are on the wrong side of that circuit split. In the 2001 plan's version of District 24, the record shows that African-Americans constituted at least *64 percent* of the Democratic-primary electorate and had an unbroken record of success in electing their preferred candidates in the general elections. The record further shows that, even if District 24 had been preserved as a black coalitional district, African-American citizens would control slightly less than their proportional share of districts statewide. Yet the District Court's simplistic interpretation of the Voting Rights Act makes these facts irrelevant. By imposing a formalistic barrier to minority claimants seeking an equitable share of electoral power through cross-racial coalition building, the "Fifty-Percent Rule" can only serve to thwart the statute's goals and retard the racial integration of American politics.

The District Court and Appellees offer three weak answers. *First*, they emphasize that African-Americans constituted only 22 percent of the citizen voting-age population in old District 24. *See* J.S. App. 54a. But that figure was artificially depressed by the presence of a third of the population who were Latinos, very few of whom in this

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[5] *See* Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2619 (2004) ("After *Ashcroft*, courts . . . will need to look beyond a talismanic fifty-percent mark and ask whether minorities are able to elect preferred candidates regardless of their share of the population.").

part of the State are citizens who actually vote. As the court acknowledged, African-Americans regularly constituted about two-thirds of the primary electorate and about a third of the electorate in general elections, J.S. App. 55a, 141a, and their candidates of choice regularly prevailed with the reliable support of a few Latinos and a minority of Anglos.[6] So despite superficial appearances to the contrary, the district is a conventional coalitional district.

Second, the court suggested that African-Americans' controlling share of the Democratic primary vote might evaporate if an African-American were to challenge Congressman Frost. J.S. App. 55a. But the figure of at least 64 percent, cited above, applies to *all* Democratic primaries for all offices held in old District 24, regardless of who was running in the primary. So the court was simply mistaken.[7]

Third, Appellees and the court suggest there is evidence that the African-American vote was not cohesive in primaries in old District 24. J.S. App. 56a; Mot. to Aff. at 25. But that "evidence" consists of one primary in which African-Americans split 72-28 and another in which they split 60-40. That lack of unanimity cannot justify destroying

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[6] Picking up on the District Court's passing comment, Appellees claim that the court found insufficient racial bloc voting to satisfy *Gingles*'s third prong. Mot. to Aff. at 25. But the court below did not purport to rule on this issue. And in *Gingles* itself, this Court found sufficient racial polarization with a white cross-over rate higher than the 30 percent shown here. *See Thornburg v. Gingles*, 478 U.S. 30, 80-81 (1986).

[7] This mistake led the court below to its curious conclusion that the district was controlled by "Anglo Democrats." J.S. App. 55a-56a. In fact, Anglo Democrats constituted only about 18 percent of the general electorate. Far outnumbered by African-American voters, they had no ability to control who was nominated by their party. Indeed, the record contains only one example of an election – the 1998 Attorney General's race – in which the African-Americans' candidate of choice in the Democratic primary did not carry the district. *See id.* at 56a.

a district where African-Americans could exercise control, particularly given the stark differences between white and black voting patterns in Texas. No one plausibly argues that racial polarization in voting has disappeared in that State.

The bottom line is that African-Americans did exercise considerable electoral power in old District 24, as even the District Court ultimately acknowledged. J.S. App. 56a. By eliminating this district, the new map guarantees the under-representation of African-Americans in Texas. It follows that this case presents a good opportunity to resolve the conflict between the Fifth Circuit's rigid "Fifty-Percent Rule" and the more nuanced and practical approach taken by the First Circuit and a number of other courts. *See* J.S. 23-24.

III. Appellees Do Not Even Try to Defend the District Court's Attempt to Justify Racially Gerrymandered District 25 as the By-Product of a Political Decision to Protect a Nearby Incumbent.

When it comes to the *Shaw* claim, Appellees *again* try to walk away from what the District Court actually said. That court recognized that District 25 was created because the Legislature made a political decision to modify old District 23 so that it would be controlled by Anglo voters and thus would reliably reelect a Republican incumbent. That, in turn, necessitated creating an additional Latino-controlled district elsewhere to avoid retrogression. J.S. App. 63a-64a, 120a-127a; *see* 42 U.S.C. § 1973c. Once District 23 was redrawn, the only way to accomplish the goal of "creat[ing] a majority-Latino citizen voting-age population district in Congressional District 25 and maintain[ing] Congressional Districts 15, 28, and 27 as majority-Latino citizen voting-age population districts" was to combine urban concentrations of Latinos in Austin and McAllen – populations the court found had little in common other than ethnicity, J.S. App. 106a-

108a – by means of a narrow and largely empty corridor running several hundred miles. Thus, the District Court found that District 25 was the product of a political incumbent-protection agenda running up against a legal duty to create another majority-Latino district, as well as geographic and demographic constraints that precluded creation of a more compact and homogeneous new Latino district.

The problem with this explanation is that it is exactly the same argument that this Court rejected in *Bush v. Vera*, 517 U.S. 952 (1996). There, the State of Texas argued that a highly irregular African-American district in Dallas resulted not from a racial agenda *per se* but from the tension between the need to create a minority-controlled district, the goal of protecting nearby Anglo incumbents, and geographic limits on ways to accomplish both simultaneously. *Id.* at 967-73. The *Bush* Court held that a misshapen majority-minority district that would otherwise violate *Shaw v. Reno*, 509 U.S. 630 (1993), cannot be exonerated by showing that incumbent protection helped drive its bizarre contours. Perhaps that is why the State all but ignores this entire line of reasoning. Although there is one line in the Motion to Affirm's fact section acknowledging that the District Court found politics to be the reason for creating District 25, *see* Mot. to Aff. at 6, the argument section does not mention the fact that District 25 only took the shape it did in order to protect the Republican incumbent's seat in District 23.

Rather than attempting to distinguish *Bush v. Vera*, the State suggests that geography alone somehow compelled a 300-mile-long "bacon strip" district carving out the most heavily Latino portion of Austin and combining it with a part of McAllen near the Rio Grande. But geography alone is no excuse, since the 2001 plan contained nothing that extreme. *See* J.S. 29 n.46. In fact, Austin had its own district in that

map and was only carved up when the State chose to transform District 23 into an Anglo-controlled district, thus necessitating squeezing into the region a new Latino district.

Finally, the State argues that the configuration of District 25 is not all that ugly. *But see* J.S. App. 164a. It points to the fact that the "land bridge" consists of a chain of whole counties, and it also notes the District Court's finding that the district's edge does not consistently splice Latinos from Anglos. Mot. to Aff. at 29-30. But the State refuses to acknowledge, let alone distinguish, this Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), which found that just such a district violated *Shaw*. In *Miller*, Georgia's Eleventh District was unconstitutional because it connected via a narrow passageway "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, [even] though [they were] 260 miles apart in distance and worlds apart in culture." 515 U.S. at 908. The connecting links, as here, consisted of whole counties. *See id.* at 941-42 (Ginsburg, J., dissenting). The *Miller* Court saw no need to examine whether every inch of the border was a racial divide. The obvious effort to connect far-flung minority populations with narrow linkages was enough. In sum, there is no meaningful way to distinguish the physical characteristics of Texas's District 25 from Georgia's Eleventh District in *Miller* – and thus no way to avoid the problem that the State's justification for creating such an obvious racial gerrymander fails under *Bush v. Vera*.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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